

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2005

(Argued: March 16, 2006                      Decided: August 24, 2006)

Docket No. 05-4770-cr

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UNITED STATES OF AMERICA,

Appellee,

- v.-

RAFIL DHAFIR, also known as Sealed  
Deft #1, MAHER ZAGHA, also known as  
Sealed Deft #2, AYMAN JARWAN, also  
known as Sealed Deft #3, HELP THE  
NEEDY, also known as Sealed Deft #5,  
HELP THE NEEDY ENDOWMENT INC., also  
known as Sealed Deft #6, Sealed Witness,

Defendants,

OSAMEH AL WAHAIDY, also known as  
Sealed Deft #4,

Defendant-Appellant.

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Before:                      JACOBS, LEVAL, Circuit Judges, RAKOFF,  
                                 District Judge.\*

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\*The Honorable Jed S. Rakoff, District Judge, United States District Court for the Southern District of New York, sitting by designation.

1           Osameh Al Wahaidy appeals from the Decision and Order  
2 of the United States District Court for the Northern  
3 District of New York (Mordue, J.), denying his motion to  
4 dismiss the indictment and upholding the constitutionality  
5 of the International Emergency Economic Powers Act. We  
6 affirm.

7                           STEVEN WARD WILLIAMS, Smith,  
8                           Sovik, Kendrick & Sugnet, P.C.,  
9                           Syracuse, New York, for  
10                          Defendant-Appellant.

11                          MICHAEL C. OLMSTED, Assistant  
12                          United States Attorney (Glenn T.  
13                          Suddaby, United States Attorney  
14                          for the Northern District of New  
15                          York; Brenda K. Sannes, Stephen  
16                          C. Green, Assistant United  
17                          States Attorneys, on the brief),  
18                          Syracuse, New York, for  
19                          Appellee.  
20

21   DENNIS JACOBS, Circuit Judge:

22           The sole issue on this appeal is whether the  
23 International Emergency Economic Powers Act ("IEEPA")  
24 constitutes an appropriate delegation of congressional  
25 authority to the executive. The IEEPA authorizes the  
26 President to regulate financial transactions with foreign  
27 countries or nationals in a time of security crisis, and  
28 prescribes criminal penalties for violations of the

1 president's regulations. Defendant-Appellant Osameh Al  
2 Wahaidy pled guilty to transferring money into Iraq on three  
3 specific occasions in 1999 and 2000, in violation of  
4 Executive Orders and regulations issued pursuant to the  
5 IEEPA, but preserved his right to bring a constitutional  
6 challenge to the statute. Al Wahaidy now appeals from the  
7 July 3, 2003 Memorandum Decision and Order of the United  
8 States District Court for the Northern District of New York  
9 (Mordue, J.) denying his motion to dismiss the indictment on  
10 the ground that the IEEPA improperly delegates Congress'  
11 authority to define criminal offenses. We affirm.

## 12 13 **BACKGROUND**

### 14 **A. The IEEPA**

15 The IEEPA, enacted in 1977 and codified at 50 U.S.C. §  
16 1701 et seq., confers on the President certain powers to  
17 respond to any threat to the national security, foreign  
18 policy or economy of the United States that is "unusual and  
19 extraordinary" and that "has its source in whole or  
20 substantial part outside the United States." 50 U.S.C. §  
21 1701(a). The President is granted the power to  
22 "investigate, regulate, or prohibit" various commercial

1 activities, including: [i] "any transactions in foreign  
2 exchange," [ii] "transfers of credit or payments between,  
3 by, through, or to any banking institution, to the extent  
4 that such transfers or payments involve any interest of any  
5 foreign country or a national thereof," and [iii] "the  
6 importing or exporting of currency or securities, by any  
7 person, or with respect to any property, subject to the  
8 jurisdiction of the United States . . . ." 50 U.S.C. §  
9 1702(a)(1)(A). The President is also authorized to block  
10 transactions involving property "in which any foreign  
11 country or a national thereof has any interest by any  
12 person, or with respect to any property, subject to the  
13 jurisdiction of the United States . . . ." 50 U.S.C. §  
14 1702(a)(1)(B). These powers may be exercised only if and  
15 when the President declares a national emergency with  
16 respect to the threat, 50 U.S.C. § 1701(a), in which event  
17 "[t]he President may issue such regulations, including  
18 regulations prescribing definitions, as may be necessary for  
19 the exercise of the authorities granted by this title." 50  
20 U.S.C. § 1704. The violation of an Executive Order or  
21 regulation promulgated pursuant to the IEEPA is punishable  
22 by a fine of not more than \$50,000 and imprisonment for not

1 more than twenty years. See 50 U.S.C. § 1705(b).<sup>1</sup> The  
2 IEEPA provides, however, that no person shall be held liable  
3 for acts or omissions conducted "in good faith." 50 U.S.C.  
4 § 1702(a)(3).

5 The IEEPA reserves a continuing role for Congress.  
6 Thus, the IEEPA provides that "[t]he President, in every  
7 possible instance, shall consult with the Congress before  
8 exercising any of the authorities granted," that he "shall  
9 consult regularly with the Congress so long as such  
10 authorities are exercised," and that he shall report  
11 periodically concerning any actions taken in the exercise of  
12 the delegated authority. 50 U.S.C. § 1703. Congress can  
13 terminate the President's declaration of emergency "by  
14 concurrent resolution pursuant to section 202 of the  
15 National Emergencies Act [50 USCS § 1622]." 50 U.S.C. §  
16 1706(b) (emendation in original).

## 18 **B. The Iraqi Sanctions Executive Orders & Regulations**

19 Following the Iraqi invasion of Kuwait in August, 1990,  
20 President George H.W. Bush issued four emergency Executive

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<sup>1</sup>Section 1706 was amended in 2006 to provide for a maximum sentence of 20 years. At the time Al Wahaidy was sentenced the maximum sentence was 10 years.

1 Orders declaring a national emergency, and prohibiting  
2 trade, transportation and financial transactions with Iraq  
3 and Kuwait. See Exec. Order No. 12722, 55 Fed. Reg. 31803  
4 (August 2, 1990); Exec. Order No. 12723, 55 Fed. Reg. 31805  
5 (August 2, 1990); Exec. Order No. 12724, 55 Fed. Reg. 33089  
6 (August 9, 1990); and Exec. Order No. 12725, 55 Fed. Reg.  
7 33091 (August 9, 1990). Executive Orders 12722 and 12724  
8 blocked the Iraqi government's property and interests in  
9 property in the United States and prohibited transactions  
10 with entities in Iraq or controlled by the Iraq government.  
11 Executive Orders 12723 and 12725 correspondingly blocked the  
12 property of the Kuwaiti government and prohibited various  
13 transactions with entities in Kuwait or controlled by the  
14 Kuwaiti government.

15 To implement the Executive Orders, the Office of  
16 Foreign Assets Control ("OFAC") promulgated regulations  
17 providing (in relevant part) that "no U.S. person may commit  
18 or transfer, directly or indirectly, funds or other  
19 financial or economic resources to the Government of Iraq or  
20 any person in Iraq." 31 C.F.R. § 575.210; see also 31  
21 C.F.R. § 575.211 (prohibiting the evasion or avoidance of  
22 the regulations and any attempt to violate the

1 prohibitions).

2       The day the President signed Executive Order 12722  
3 declaring a national emergency, the Senate passed a  
4 resolution commending the measures taken and urging the  
5 President to act immediately to enforce the IEEPA and to  
6 impose sanctions against Iraq. See S. Res. 318, 101st Cong.  
7 (1990). Several days later, the House passed its version of  
8 the Sanctions Against Iraq Act of 1990, authorizing economic  
9 sanctions under the authority of the IEEPA. H.R. 5431,  
10 101st Cong. (2d Sess. 1990). In November 1990, Congress  
11 passed "The Iraqi Sanctions Act", declaring that Congress  
12 "supports the actions that have been taken by the President  
13 . . . [and] supports the imposition and enforcement of  
14 multilateral sanctions against Iraq," and requiring that the  
15 President "continue to impose the trade embargo and other  
16 economic sanctions with respect to Iraq and Kuwait . . . ,  
17 pursuant to Executive Orders Numbered 12724 and 12725  
18 (August 9, 1990) and, to the extent they are still in  
19 effect, Executive Orders Numbered 12722 and 12723 (August 2,  
20 1990)." Iraqi Sanctions Act, Pub. L. 101-513 § 586, 104  
21 Stat. 1979, 2047-48 (1990).

1

2 **C. Al Wahaidy's Plea and Conviction**

3 On February 19, 2003, Al Wahaidy was charged in an  
4 Indictment, which was superseded on April 23, 2003, by an  
5 Information charging three specific instances of "willfully  
6 attempt[ing] to violate and evade Executive Order Numbers  
7 12722 and 12724 and the regulations issued under those  
8 Executive Orders and under the [IEEPA]" by transferring  
9 "funds and other economic resources to one or more persons"  
10 in Iraq. The Information alleged that the violations  
11 occurred on October 25, 1999, November 9, 1999, and February  
12 23, 2000, and that they involved a total amount of  
13 \$100,000.<sup>2</sup> On April 4, 2003, Al Wahaidy moved to dismiss  
14 the charges on the ground that the IEEPA unconstitutionally  
15 delegated legislative authority to the executive branch. On  
16 April 23, 2003, Al Wahaidy pled guilty to the charges in the  
17 Information, but he preserved his right to challenge the  
18 statute's constitutionality. On July 3, 2003, the district

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<sup>2</sup>Al Wahaidy admitted that he and others attempted to transfer funds through Jordan to persons in Iraq, in violation of 31 C.F.R., Subpart B, § 575.210, which is punishable as a violation of IEEPA pursuant to 50 U.S.C. § 1705. Al Wahaidy said he believed the funds were being used to help needy people in Iraq; but the funds were actually used by Iraqi "agents" for a series of undisclosed projects.

1 court denied Al Wahaidy's motion to dismiss the indictment  
2 and upheld the constitutionality of the IEEPA. On August  
3 12, 2005, Al Wahaidy was sentenced to two years probation,  
4 100 hours of community service, and a \$5000 fine. This  
5 appeal ensued.

## 7 DISCUSSION

8 Al Wahaidy argues [i] that the IEEPA is an improper  
9 delegation to the President of the Congressional authority  
10 to create criminal offenses, and [ii] that, in any event,  
11 the delegation fails on its own terms because the government  
12 has not shown that the executive has complied with the  
13 statutory reporting requirements.

### 15 A. Constitutionality of the IEEPA

16 We review the constitutionality of a federal statute de  
17 novo. United States v. Awadallah, 349 F.3d 42, 51 (2d Cir.  
18 2003).

19 The Constitution vests in Congress the legislative  
20 power to define criminal conduct; but "our jurisprudence"  
21 has reached a "practical understanding that . . . Congress  
22 simply cannot do its job absent an ability to delegate power

1 under broad general directives." Mistretta v. United  
2 States, 488 U.S. 361, 372 (1989). Delegations of  
3 congressional authority are upheld "[s]o long as Congress  
4 'shall lay down by legislative act an intelligible principle  
5 to which the person or body authorized to [exercise the  
6 delegated authority] is directed to conform.'" Id.  
7 (emendation in original) (quoting J.W. Hampton, Jr., & Co.  
8 v. United States, 276 U.S. 394, 406 (1928)). Under that  
9 standard, impermissible delegation has been rarely found.  
10 Since the articulation of the "intelligible principle" test  
11 in J.W. Hampton, Jr., the Supreme Court has struck down only  
12 two statutes as impermissible delegations. See A.L.A.  
13 Schechter Poultry Corp. v. United States, 295 U.S. 495  
14 (1935) (striking down delegation to industry associations  
15 comprised of private individuals to create legally binding  
16 codes of "fair competition"); Panama Refinery Co. v. Ryan,  
17 293 U.S. 388 (1935) (striking down blanket delegation to  
18 President to criminalize the interstate transport of  
19 petroleum). Neither instance involved foreign affairs, a  
20 sphere in which delegation is afforded even broader  
21 deference. See Zemel v. Rusk, 381 U.S. 1, 17 (1965)  
22 ("Congress--in giving the Executive authority over matters

1 of foreign affairs--must of necessity paint with a brush  
2 broader than that it customarily wields in domestic  
3 areas."); United States v. Curtiss-Wright Export Corp., 299  
4 U.S. 304, 315-22 (1936) (explaining why delegations in the  
5 foreign affairs context differ from those in the domestic  
6 context). Thus a delegation to the executive that may be  
7 improper if confined to internal affairs might "nevertheless  
8 be sustained on the ground that its exclusive aim is to  
9 afford a remedy for a hurtful condition within foreign  
10 territory." Curtiss-Wright, 299 U.S. at 315. This  
11 indulgence stems from the Constitution: "In this vast  
12 external realm, with its important, complicated, delicate  
13 and manifold problems, the President alone has the power to  
14 speak or listen as a representative of the nation." Id. at  
15 319; see also Zemel, 381 U.S. at 17.

16 The Supreme Court has upheld Congressional delegation  
17 to the executive--under the IEEPA--to nullify certain  
18 attachments and transfers of assets. See Dames & Moore v.  
19 Regan, 453 U.S. 654, 675 (1981); Regan v. Wald, 468 U.S.  
20 222, 232-33 (1984) (holding that regulations promulgated  
21 pursuant to the IEEPA and the Trading with the Enemy Act  
22 were constitutional); see also Zemel, 381 U.S. 1 (upholding

1 the Passport Act of 1926, which gave the Secretary of State  
2 the power to grant and issue passports without setting forth  
3 standards to guide the use of his discretion). Likewise,  
4 this court and our sister circuit courts have upheld such  
5 delegations. See Sardino v. Federal Reserve Bank, 361 F.2d  
6 106, 110 (2d Cir. 1966) (upholding constitutionality of the  
7 Trading with the Enemy Act); Freedom to Travel Campaign v.  
8 Newcomb, 82 F.3d 1431, 1437-38 (9th Cir. 1996) (upholding  
9 constitutionality of Congress' delegation of authority to  
10 renew the Cuban embargo solely upon a determination that it  
11 is "in the national interest"); see also United States v.  
12 Esfahani, No. 05 Cr. 0255, 2006 WL 163025, at \*11 (N.D. Ill.  
13 Jan. 17, 2006) (upholding constitutionality of the IEEPA);  
14 United States v. Anvari-Hamedani, 378 F. Supp. 2d 821 (N.D.  
15 Ohio 2005) (upholding constitutionality of the IEEPA).

16 The Supreme Court has also upheld particular  
17 delegations of authority to define criminal offenses,  
18 although not yet in the context of the IEEPA. In Curtiss-  
19 Wright Export Corp., 299 U.S. 304, the Court upheld a  
20 Congressional resolution empowering the President to declare  
21 illegal the sale of arms to certain countries (specified by  
22 the President), without discussing any special

1 considerations that may be implicated when the President is  
2 granted the power to define crimes. See also United States  
3 v. Grimaud, 220 U.S. 506, 517 (1911) ("[W]hen Congress had  
4 legislated and indicated its will, it could give to those  
5 who were to act under such general provisions 'power to fill  
6 up the details' by the establishment of administrative rules  
7 and regulations, the violation of which could be punished by  
8 fine or imprisonment fixed by Congress, or by penalties  
9 fixed by Congress, or measured by the injury done."). In  
10 Touby v. United States, 500 U.S. 160 (1991), the Supreme  
11 Court upheld a delegation of power to the Attorney General  
12 to expedite the designation of a substance as "controlled"  
13 by bypassing (for a limited time) several of the  
14 requirements for permanent scheduling. The Touby Court  
15 weighed the petitioner's argument that "something more than  
16 an 'intelligible principle' is required when Congress  
17 authorizes another Branch to promulgate regulations that  
18 contemplate criminal sanctions," but declined to decide  
19 whether more specific guidance was required, because the  
20 statute passed muster even under a heightened standard:

21 Our cases are not entirely clear as to whether  
22 more specific guidance is in fact required. We  
23 need not resolve the issue today. We conclude  
24 that § 201(h) passes muster even if greater

1 congressional specificity is required in the  
2 criminal context.

3  
4 Id. at 165-66 (internal citations omitted). The Court  
5 concluded the statute "meaningfully constrain[ed] the  
6 Attorney General's discretion to define criminal conduct,"  
7 by requiring that the powers only be exercised when  
8 "necessary to avoid an imminent hazard to the public  
9 safety," by specifying what constitutes "an imminent  
10 hazard," and by requiring notice to and consideration of  
11 comments from the Secretary of Health and Human Services.  
12 Id. at 166-67 (quoting the statute at issue).

13 Even if a heightened standard should apply to  
14 delegations concerning criminal offenses, the IEEPA's  
15 delegation is subject to constraints similar to those found  
16 sufficient in Touby. See United States v. Arch Trading Co.,  
17 987 F.2d 1087, 1093 (4th Cir. 1993) (comparing IEEPA's  
18 provisions with the statute upheld in Touby). The IEEPA  
19 "meaningfully constrains the [President's] discretion,"  
20 Touby, 500 U.S. at 166, by requiring that "[t]he authorities  
21 granted to the President . . . may only be exercised to  
22 deal with an unusual and extraordinary threat with respect  
23 to which a national emergency has been declared." 50 U.S.C.  
24 § 1701(b). And the authorities delegated are defined and

1 limited. See 50 U.S.C. § 1702.

2 Al Wahaidy argues that Touby upheld a temporary power  
3 (to define what constitutes a controlled substance under  
4 criminal law), whereas the IEEPA gives the President the  
5 power "to define conduct as criminal for an unlimited time  
6 once a national emergency is declared." The IEEPA  
7 delegation is, however, subject to the President's periodic  
8 re-affirmation of necessity and is conditioned on reporting  
9 to Congress. 50 U.S.C. § 1703. Moreover, Congress can  
10 terminate the President's declaration of emergency. 50  
11 U.S.C. § 1706.

12 Certain additional factors not present in Touby further  
13 weigh in favor of upholding the IEEPA's criminal provisions.  
14 Significantly, the IEEPA relates to foreign affairs--an area  
15 in which the President has greater discretion. See Dames &  
16 Moore, 453 U.S. at 675. Additionally, Congress endorsed the  
17 President's actions and enacted legislation codifying the  
18 sanctions. There is thus no question that "'the will of  
19 Congress has been obeyed.'" Touby, 500 U.S. at 168 (quoting  
20 Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 218  
21 (1989)).

1     **B.     The President's Compliance with the IEEPA<sup>3</sup>**

2             Al Wahaidy argues in any event that the  
3     constitutionality of the delegation depends upon a showing  
4     by the government that the President has complied with the  
5     statutory reporting requirements imposed upon his exercise  
6     of power under the IEEPA.<sup>4</sup> According to Al Wahaidy, only

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<sup>3</sup>At oral argument and in subsequent briefing, we learned that Congress may have failed to comply with its oversight responsibilities. Specifically, the House of Representatives may not have satisfied its obligation under the National Emergencies Act to meet "each six-month period [l]after [the declaration of a national emergency] . . . to consider a vote on a joint resolution to determine whether that emergency shall be terminated." 50 U.S.C. § 1622(b). Whether the House of Representatives' possible inaction affects the validity of the Iraqi sanctions regulations raises complicated and sensitive issues concerning separation of powers. We decline to consider this issue because it was not raised by the defendant or considered by the district court, and the record before us is incomplete.

<sup>4</sup>50 U.S.C. § 1703 provides, in part:

(b) Report to Congress upon exercise of Presidential authorities. Whenever the President exercises any of the authorities granted by this chapter [50 USCS §§ 1701 et seq.], he shall immediately transmit to the Congress a report specifying--

(1) the circumstances which necessitate such exercise of authority;

(2) why the President believes those circumstances constitute an unusual and extraordinary threat, which has its source in whole or substantial part outside the United

1 one of the statutorily-required six-month periodic reports  
2 was proffered to the district court, and the government  
3 thereby failed to sustain its burden of proof. This  
4 argument rests on two defective premises.

5 First, case law does not support the idea that the  
6 government bears the burden of proving its compliance with a  
7 statute in order to establish the statute's

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States, to the national security, foreign  
policy, or economy of the United States;

(3) the authorities to be exercised and the  
actions to be taken in the exercise of those  
authorities to deal with those circumstances;

(4) why the President believes such actions  
are necessary to deal with those  
circumstances; and

(5) any foreign countries with respect to  
which such actions are to be taken and why  
such actions are to be taken with respect to  
those countries.

(c) Periodic follow-up reports. At least once  
during each succeeding six-month period after  
transmitting a report pursuant to subsection (b)  
of this section with respect to an exercise of  
authorities under this chapter [50 USCS §§ 1701 et  
seq.], the President shall report to the Congress  
with respect to the actions taken, since the last  
such report, in the exercise of such authorities,  
and with respect to any changes which have  
occurred concerning any information previously  
furnished pursuant to paragraphs (1) through (5)  
of subsection (b) . . . .

1     constitutionality.  Al Wahaidy cites dicta in Panama  
2     Refining Co. v. Ryan, 293 U.S. 388 (1935), an opinion that  
3     invalidated Congress' delegation to the President to pass a  
4     law prohibiting the interstate transport of petroleum  
5     products produced in excess of state quotas.  293 U.S. at  
6     414-15.  The Supreme Court explained that Congress'  
7     delegation failed to "declare[] a policy with respect to  
8     that subject[,] . . . [to] set-up a standard for the  
9     President's action[,] . . . [or to require] any finding by  
10    the President in the exercise of the authority to enact the  
11    prohibition."  Id. at 415.  The Supreme Court further added  
12    in dicta, "if . . . it were possible to derive a statement  
13    of prerequisites to the President's action . . ., it would  
14    still be necessary for the President to comply with those  
15    conditions and to show that compliance as the ground of his  
16    prohibition."  Id. at 431.  That dicta notwithstanding, we  
17    are aware of no court that has placed on the government the  
18    burden to prove compliance with a statute's requirements in  
19    order to defeat a claim that the statute is  
20    unconstitutional.  See Heller v. Doe, 509 U.S. 312, 320  
21    (1993) ("[T]he burden is on the one attacking the  
22    legislative arrangement to negative every conceivable basis

1    which might support it . . . .’”) (quoting Lehnhausen v.  
2    Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)); Usery  
3    v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976) (“It is  
4    by now well established that legislative Acts adjusting the  
5    burdens and benefits of economic life come to the Court with  
6    a presumption of constitutionality, and that the burden is  
7    on one complaining of a due process violation to establish  
8    that the legislature has acted in an arbitrary and  
9    irrational way.”).

10       Second, regardless of who bears the burden of proving  
11    compliance with the IEEPA, the present record is not limited  
12    to a single report. The government’s memorandum in  
13    opposition to Al Wahaidy’s motion stated that the President  
14    had complied with the IEEPA’s reporting requirements, drew  
15    the court’s attention to its website where each of the  
16    reports may be found, and included an example of the report.  
17    This showing was sufficient; the district court was  
18    satisfied, and it does not appear that Al Wahaidy contested  
19    the point in the district court. Cf. Pani v. Empire Blue  
20    Cross Blue Shield, 152 F.3d 67, 75 (2d Cir. 1998) (“It is  
21    well established that a district court may rely on matters  
22    of public record in deciding a motion to dismiss under Rule

1 12(b)(6), including case law and statutes.").

2 Public records reflect that each President has  
3 fulfilled his obligations under the IEEPA for the period  
4 (1990-2003) in which the relevant Executive Orders and  
5 regulations were in place. With respect to the Iraqi  
6 sanctions at issue here, President George H.W. Bush  
7 coordinated with Congress before and when he invoked his  
8 authority under IEEPA, and sent a "Message to Congress" on  
9 August 3, 1990 reporting his Executive Order (issued the day  
10 before) declaring a national emergency; and each President  
11 from 1990 until 2003 sent a report to Congress every six  
12 months detailing the sanctions actions. Finally, pursuant  
13 to the National Emergencies Act, 50 U.S.C. § 1622, each  
14 President has annually reported to Congress in order to  
15 continue the national emergency with respect to Iraq.

## 18 CONCLUSION

19 For the foregoing reasons, we affirm the judgment.